Monthly, the deceased would therefore utilise RM7.50 (rounded up at RM10 per month). Thus, the figure would be RM1,110 - RM10 = RM1,100 per month. This method of calculation is perfectly legitimate. It is now established that the sum to be deducted as living expenses is based on the proportion of the victim's net earnings which he spends to maintain himself at the standard of life appropriate to his case and any sums expended to maintain others do not form part of the victim's living expenses and should not, consequently, be deducted from the net earnings (see *Harris v. Empress Motors Ltd.* [1984] 1 WLR 212 especially at p. 228). The multiplier to be adopted would be dependant on s. 7(3)(iv)(d) of the Civil Law Act 1956 i.e. "... in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time of his death, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time of death and dividing the remainder by the figure 2." The deceased was 35 years of age at the time of his death. thus, 55-35 = 20 - 2 = 10 years. By simple arithmetic, using 10 as a multiplier, the result would be (RM1,110 x 12 months) x 10 years = RM132,000 for **loss of earnings**.

The first plaintiff sustained the following injuries:

(a) cerebral concussion. I would award RM1,500 for this injury on the authorities of *Chua Leh Choo & Anor. v. Mohd. Noor bin Ibrahim & Ors.* [1988] 2 MLJ xxxi and *Eiap Teng Siyum v. Mohd. Noor bin Ibrahim & Anor.* [1988] 2 MLJ xxx.

(b) abrasion 2 cm right cheek. For this injury, I would award RM500 taking into account inflationary rate and by comparing with *Abdullah Ahmad v. Cheng Meng Chee* [1988]1 MLJ xxxvii where a sum of RM300 was awarded for abrasion of right temple.

(c) soft tissue injury. A sum of RM300 would be awarded.

I would award the second plaintiff, a young boy of 4 years of age, RM500 for pain over his right cheek on the authority of *Lam Len Chen (w) v. Sim Hee Tien* [1985] 2 MLJ cxcii where a sum of S$500 was awarded for concussion, abrasion of the face and haematoma.

Finally, I award interest for general damages at the rate of 6% per annum from date of filing of the suit to date of judgment.

Order accordingly.

PUBLIC PROSECUTOR

v.

CHUAH KOK WAH

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN HAJI MOHD YUNUS JC
[CRIMINAL TRIAL NO. 47-3-90]
6 DECEMBER 1993

EVIDENCE: Whether chemist an expert witness - Whether relevant tests on drugs conducted - Evidence of Chemist - Marking on Exhibits by Police - Chain of Evidence - Whether failure to carry out fingerprint tests on exhibits invoked s. 114(g) Evidence Act 1950 - Whether finger print tests required.

DANGEROUS DRUGS: Custody and control - Whether presumptions under s. 37(d) Dangerous Drugs Act 1952 operates - Whether knowledge of existence of drug needs to be proved before presumptions under s. 37(d) DDA 1952 can be invoked - Whether prima facie case established.

EVIDENCE: Weight of exculpatory cautioned statements - "Prima facie" case - Qualification of expert witness - Dangerous Drugs Act 1952.

The accused was charged with trafficking in 864.27 gms. heroin under s. 39B(1)(a) DDA 1952. The accused was arrested at a jetty at Pulau Ketam by the police where in a body search a plastic packet was found in the accused's underwear and two other similar packets, each taped to the left and right thigh of the accused. The packets were seized and were found to contain whitish substance which were later analysed by the Government chemist (SP1) and found to contain 864.27 gms. of heroin.

At the close of the prosecution's case the defence submitted that the prosecution failed to make out a *prima facie* case. It was the contention of the defence that there was no evidence (SP1) was an expert witness or that he was qualified in analysis of heroin.

The defence Counsel challenged that even if SP1 was an expert there was no evidence he had analysed the substance in question or carried out necessary tests. It was also submitted that as the prosecution had failed to carry out a fingerprint test on the vital exhibits, the Court should invoke s. 114(g) of the Evidence Act 1950. The defence Counsel further contended that in order to prove custody and control and to rely on the presumptions under s. 37(d) of the DDA

1952, the prosecution must prove that the accused had knowledge that the packets contained the dangerous drugs.

The Court rejected the defence of no case to answer and called the accused to enter his defence.

The accused elected to give evidence an oath with the gist of the defence being that the accused had no knowledge of the actual contents of the packets.

Held:

[1] There was ample evidence that SP1 was an expert on drug analaysis. It is not necessary in giving evidence with regard to his experience and training to specifically mention "analysis of heroin". It was sufficient to state that he had training and experience in analysis of dangerous drugs and experience in giving evidence relating to analysis of dangerous drugs and that his evidence had been accepted by the Courts.

[2] The Court is entitled to accept the opinion of an expert at its face value unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. There is no necessity for the chemist or an expert witness in determining the identity of a substance to go into details of what he did in the laboratory step by step.

[3] The main purpose of carrying out a fingerprint test in a criminal investigation is to determine if a person has had any physical contact with an article which is the subject matter of the offence. Since it was the prosecution's case that the plastic packet containing the drugs were found on the accused's body, strictly there was no necessity to carry out any fingerprint test for purposes of prosecution. An adverse inference under s. 114(g) of the Evidence Act cannot be applied for failure to take fingerprint impressions as the adverse inference can only be drawn if there is witholding of evidence and not merely on account of failure to obtain evidence.

[4] All that was necessary for the prosecution to prove in order for the presumptions under s. 37(d) DDA 1952 to operate is that the accused person was found to have had in custody or under his control "anything whatsoever" containing any dangerous drug. What is necessary to be proved is knowledge of possession of the "anything whatsoever" and not knowledge of the drugs contained therein. There is no requirement for the prosecution to prove that the accused had knowledge of the existence of the drugs in the three packets found on his body to invoke the presumptions under s. 37(d) DDA 1952.

[5] The defence evidence on the whole failed to rebut on a balance of probability the presumptions under s. 37(d) and (da)(i) DDA 1952.

[6] The defence expert witness, a chemist, could not be accepted by the Court as qualified to give expert evidence because the chemist lacked practical working experience for almost 13 years before giving evidence in this case. Even assuming that the Court is wrong in not accepting the witness as an expert there was nothing in his evidence that really contradicted the tests employed by SP1.

[Accused found guilty. Convicted and sentenced according to law].

Cases referred to:

Public Prosecutor v. Lim Lian Chen [1990] 2 CLJ 1020 ***(dist)***

Munusamy v. Public Prosecutor [1987] 1 MLJ 492 ***(foll)***

Public Prosecutor v. Lam San [1991] 3 MLJ 426 ***(foll)***

Pendakwa Raya v. Lim Eng Chye [1978] MLJ 200 ***(refd)***

Pendakwa Raya v. Lim Ah Beh [1989] 2 CLJ 1090 ***(refd)***

Pendakwa Raya v. Lin Lian Chen [1992] 2 MLJ 561 ***(refd)***

Pendakwa Raya v. Forster Frank [1987] 2 CLJ 177 ***(refd)***

Pendakwa Raya v. Chee Kon Fatt [1991] 3 CLJ 2564 ***(refd)***

Public Prosecutor v. Badrulsham [1988] 2 MLJ 585 ***(refd)***

Public Prosecutor v. Adetunji Adeleye Sule [1993] 3 CLJ 113 ***(foll)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(d), (da)(i), 39B(1)(a), (2), First Schedule

Evidence Act 1950, s. 114(g)

For the public prosecutor - Rusli Zain, DPP

For the accused - Gurbachan Singh

JUDGMENT

Mohd Hishamudin Bin Haji Mohd Yunus JC:

At the initial stage, this trial was heard by Dato' Wira Wan Yahaya J. (as he then was). Subsequently his Lordship was elevated to the Supreme Court. On 7 January 1993 when this case first came before me, for the continuation

of the trial, both the learned DPP and defence Counsel had no objection to my continuing with the trial.

In this case, the accused was charged as follows:

> Bahawa kamu pada 15 November 1989, Jam lebih kurang 1.30 petang di jeti Syarikat, di Pulau Ketam, di dalam Daerah Klang di dalam Negeri Selangor Darul Ehsan telah mengedar 864.27 gram heroin dan oleh itu kamu telah melakukan satu kesalahan di bawah s. 39B (1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) Akta 234 dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

According to the prosecution's case, the accused was arrested by two police personnel, namely, one Inspector Amarjit Singh (SP5) of Cawangan Anti Dadah Bukit Aman together with one Det. Kpl. Abdullah Kadir bin Kadir, at about 1.15 p.m. on 15 November 1989, at a jeti at Pulau Ketam. After having identified himself as a police officer, SP5 proceeded to search the body of the accused. SP5 found tucked in the accused's underwear a plastic packet. He also found two more similar packets, one tied to the left thigh and the other to the right thigh of the accused. The packets were tied to the thighs by means of yellow tapes. The three packets were subsequently seized and were found to contain a whitish substance suspected to be heroin. The three packets (together with other items seized) were handed to the investigating officer, ASP Leow Kam Soon (SP2), who, in turn, handed the packets to the government chemist (SP1) for analysis. SP1 analysed the whitish substance and found the substance to contain 864.27 grams of herion.

At the close of the case for the prosecution, the learned defence Counsel, Encik Gurbachan Singh made a lengthy submission. He submitted that the prosecution had failed to make out a *prima facie* case. He submitted, first, that there was no evidence that SP1 was an expert witness because there was no evidence that SP1 ever analysed heroin; that there was no evidence that he had given evidence in Court as an expert on the analysis of heroin; and that there was no evidence that he had any qualification or on the job training or any experience in the analysis of heroin.

SP1 had given evidence as follows:

> I have been attached to this department [Department of Chemistry] for 18 years past. I am a graduate in Bachelor of Science, Honours Degree majoring in Chemistry. I have been a forensic chemist for the past 18 years. I have attended training for 9 months as forensic chemist at Crime Laboratory, Los Angeles, Police Department. Form of training - analysis of drugs. I have given evidence in Court on various occasions relating to dangerous drugs. Yes, my evidence have been accepted by the Court.

On the above evidence I was satisfied that there was ample evidence that SP1 was an expert on drugs analysis, including the analysis of heroin. It is true that the witness, in introducing himself as an expert, did not specifically mention "analysis of heroin". But I did not think that in giving evidence relating to his experience and training it was necessary for the witness to mention specifically the word "analysis of heroin". It was sufficient for him just to state in evidence (apart from his academic qualification) that he had training and experience in the analysis of dangerous drugs as well as experience in giving evidence relating to the analysis of dangerous drugs and that his evidence had been accepted by the Courts. It is common knowledge that heroin is a drug. It is also common knowledge that heroin is a dangerous drug. Encik Gurbachan argued that, since SP1 only mentioned that he had training and experience in the analysis of dangerous drugs and had not specifically mentioned "heroin", therefore the Court could not assume that SP1 was an expert in the analysis of heroin. With due respect, I need not and was not making any assumption here. SP1 had given evidence in Court that he had been a government forensic chemist for the past 18 years. This evidence and other evidence relating to his qualifications, training and experience (including that of giving evidence in Court) was never challenged by the defence. Moreover, in this country, even the man on the street knows that when one mentions the word "drugs" or "dangerous drugs" in the context of the criminal law one normally refers to such drugs as heroin, opium, cannabis and morphine.

To fortify his point, learned Counsel cited *Public Prosecutor v. Lim Lian Chen* [1990] 2 CLJ 1020 where at p. 1021, Mohtar bin Abdullah J. said:

> Although the Court takes judicial notice of the common fact that a government chemist is called upon to examine and analyse exhibits sent to the Chemistry Department by the police and other law enforcement agencies, it cannot, by the mere fact that a witness is a

> government chemist of some standing, hold that the witness in question is an expert in the particular field of expertise in the case before it. A Bachelor of Science (Honours) Degree, majoring in chemistry, does not necessarily imply that the witness concerned has an expert knowledge of heroin - nor does 13 years experience in the Chemistry Department similarly clothe the witness with expertise in the analysis of heroin! In our present case, the prosecution need to show that PW2 has the expertise, or at the very least some experience, in the analysis of heroin to qualify him as an expert. The particular field of experience required in this case is the analysis of dangerous drugs, principally heroin - but all that the prosecution had shown was that PW2 was an expert in Blood Serology.

With respect, there is nothing in the above passage to support learned Counsel's contention. What was said by the learned Judge must be understood in the context of the facts of the case. The evidence of the witness in *Lim Lian Chin* pertaining to his expertise was very sketchy. Nor were the facts in that case similar to the facts of the present case. In the above case, unlike the present case, there was no evidence that the witness was an experienced forensic chemist. Also, in the above case, unlike the case before me, the witness was only an expert in blood serology and there was no evidence that he had any training or experience in the analysis of drugs. Further, in *Lim Lian Chin*, unlike the present case, there was no evidence that the witness had given evidence in Court relating to the analysis of dangerous drugs and that his evidence had been accepted by the Courts.

I need only to refer to *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 to show that the learned Counsel's argument was without substance (with due respect). In that case, the Supreme Court accepted that the government chemist was an expert although the facts adduced as to his qualifications and experience were merely as follows (as stated by Mohamed Azmi J. at p. 496 in the judgment):

> On the above evidence, we find it difficult to appreciate the validity of various criticisms levelled at Mr. Ng. There was no dispute that Mr. Ng had been a chemist with the Chemistry Department for 12 years. He possessed a B. Sc. degree in Chemistry and Biology, and had given expert evidence in Court, and such evidence had been accepted in the High Court in drug cases.

The second argument advanced by learned Counsel was that, even if SP1 was an expert, still there was no evidence that he had satisfactorily analysed the substance in question, in particular, he had not carried out the necessary tests. I need only to refer to following evidence of SP1's tesmony to show that there is no truth in learned Counsel's contention:

> When I received E1, E2, and E3, I opened the envelope in the presence of ASP Leong, examined the contents, and subsequently I kept the exhibits in a strong room where I had my own personal locker. I subsequently examined the 3 envelopes and found in E1 a plastic package also marked E1 to which was secured with cellophane tape, containing 448.97 gms of an off white powder compressed into a slab form. I then analysed and found it to contain 292.27 gms of heroin.
>
> E2 contained a plastic packet also marked E2, also secured by cellophane tape containing 454.21 gms of off white powder compound in slab form. I analysed and found to contain 276.75 gms of heroin.
>
> E3 contained a plastic packet also marked E3 secured with cellophane tape containing 453.75 gms of off white powder compressed into a slab form. I analysed and found powder to contain 295.25 gms of heroin. Heroin is in 1st Schedule in Dangerous Drugs Act.

SP1 also said in examination in chief:

> The slab has been powdered for analysis.

In cross-examination, the witness was asked the following question by learned Counsel:

> On chemical analysis, what is the substantive test?

SP1's answer was:

> After preliminary examination, colour test, the other tests, thin layer chromatography test (TLC), thin gas chromatography (GC) analysis, Gas chromatography (GCMS). These are the three tests to determine heroin.

Further, in cross-examination, the witness said:

> I agree preliminary test will narrow down the substance but I am not able at that stage to say it is heroin. The subsequent three tests confirm the substance and its weight.

SP1's evidence must be looked at in its totality. Taking his evidence as a whole, it is crystal clear that he had carried out the necessary tests.

It is true that SP1 did not explain in detail regarding the analysis carried out by him. However, in *Munusamy* the Supreme Court held:

> As a rule, a chemist in drug cases does not give any opinion as to ownership, control or possession of the substance sent for analysis, but he merely reports the result of the chemical examination of the substance. The only reason for sending the exhibits to the chemist is to determine their identity and to confirm what other witnesses have suspected. This type of opinion must in our view be distinguished from opinions which are of very technical or complicated nature, such as those given by handwriting trade mark, copyright or ballistics experts. Without being derogatory it is common knowledge that even animals, such as snuff dogs when sufficiently trained, are able to detect certain dangerous drugs. We are therefore of the view, that this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the Court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory step-by-step.

In *Public Prosecutor v. Lam San* [1991] 3 MLJ 426 the Supreme Court again adopted the same approach. At p. 428 of the judgment, the Court reiterated:

> As to how a trial Court should approach the evidence of a chemist, we wish to advert to the judgment of this Court in *Munusamy v. PP* where in a passage at p 496F, Mohamed Azmi SCJ on behalf of the Court put in focus the function of the chemist in a trial of this nature:
>
> > We are therefore of the view, that this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the Court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory step-by-step.
>
> Two things are implicit in that passage. First, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as *prima facie* evidence. Secondly, so long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory.

Applying the above principle, in the present case, there was no necessity for SP1 to show the Court in detail what he did in the laboratory, unless he was asked to do so by the defence Counsel during cross-examination. But the irony of the approach adopted by the defence was that, learned Counsel had severely criticised the evidence of SP1 during his submission of no case to answer; yet he did not find it fit to ask SP1 in detail or to attack SP1's evidence when he had every opportunity to do so earlier on during the cross-examination of SP1! In any case, I found nothing in the evidence of SP1 to compel me to regard it as inherently incredible.

The third point raised by learned Counsel was that the vital exhibits P4C and P4D, P5C and P5D, and P6C and P6D had remained completely unmarked and unsealed by any police officer and as such there had been a serious doubt as to their identity. P4C, P5C and P6C were plastic packets; and P4D, P5D and P6D were the drugs allegedly found in P4C, P5C and P6C respectively. First and foremost, there is no question of marking P4D, P5D and P5D. These were the drug itself. It is not possible for the police to put any markings on the drug itself because of their physical nature (powder in slabs form). Therefore, the suggestion that the police should have marked the drug itself was, with due respect, ridiculous.

Now, I come to the question as to why the plastic packets (P4C, P5C and P6C) were not marked by the police. SP5 (the arresting officer) had given evidence that he did not open any of the plastic packets seized from the accused's body. After seizure, he handed the packets to the Investigating Officer (I.O.), ASP Leow (SP2). He handed the packets to SP2 in their original form, except that, before handing over, he did mark the packets as "E1", "E2" and "E3" respectively; and on every packet he wrote his initial and the date "15 November 1989". SP5 also said that inside "E1", "E2" and "E3" was a plastic packet, which was identified in Court by the government chemist (SP1) as ID4C, ID5C and ID6C respectively, and subsequently tendered in Court by the I.O. (SP2) as exhibits P4C, P5C and P6C respectively. The I.O. (SP2) gave evidence that he too did not open "E1", "E2" and "E3", but wrote on each plastic packet the report number "Pulau Ketam Report 174/89". He put

each plastic packet in an envelope which he marked also as "E1", "E2" and "E3" respectively. On each envelope he wrote the report number. Each of the envelopes was sealed with the seal "PDRM 333". He personally sent the envelopes to the government chemist, SP1. It was SP1 who opened the plastic packets "E1", "E2" and "E3" and who also opened P4C, P5C and P6C (in order to analyse P4D, P5D and P6D). It is obvious that the reason why the plastic packets P4C, P5C and P6C were not marked by either the arresting officer (SP5) or the I.O. (SP2) was that each of these packets was inside another packet, "E1", "E2" and "E3" (P4B, P5B and P5C), and neither SP5 nor SP2 ever opened the outer packet P4B, P5B or P6B. Further, SP2 also gave evidence that when he received P4B, P5B and P6B from SP5, P4C (containing P4D) was inside P4B, P5C (containing P5D) was inside P5B, and P6C (containing P6D) was inside P6B; and P4B, P5B and P6B were all sealed. I therefore could not accept learned Counsel's contention that there was a serious doubt as to the identity of the vital exhibits. In addition, having examined closely the evidence of SP1, SP2, SP5 and SP6, I was fully satisfied that there had been a careful marking, handling and custody of the exhibits by the officers concerned and there was no likelihood of tempering or of a break in the chain of evidence. I do not think it is necessary for me to elaborate further on this point.

Fourthly, it was submitted by learned Counsel that as the prosecution had failed to carry out a fingerprint test on the vital exhibits therefore the Court should invoke s. 114(g) of the Evidence Act against the prosecution. It was argued that only if a fingerprint test was taken could the Court be in a position to determine whether the contents of the accused's cautioned statement was true or otherwise. In this case, no fingerprint test was taken, but SP2 gave evidence that he did not think it was necessary for him to do so. Learned Counsel contended that it was imperative and cited the following cases:

Pendakwa Raya v. Lim Eng Chye [1978] MLJ 200 *Pendakwa Raya v. Lim Ah Beh* [1989] 2 CLJ 1090 *Pendakwa Raya v. Lin Lian Chen* [1992] 2 MLJ 561 *Pendakwa Raya v. Forster Frank* [1987] 2 CLJ 177 *Pendakwa Raya v. Chee Kon Fatt* [1991] 3 CLJ 2564

In my view, the purpose of carrying out a fingerprint test in a criminal investigation is mainly to determine if the accused or any other person has had any physical contact with the article which is the subject matter of the offence. To my mind, in the present case, since it was alleged by the prosecution and admitted by the accused in his cautioned statement that the plastic packets containing the drug slabs were found on the accused's body, strictly there was no necessity to carry out any fingerprint test for the purpose of criminal prosecution against the accused. Of course, looking at the matter in a wider perspective, perhaps it might have been beneficial for the purpose of police investigation if a fingerprint test was taken. For, such a measure if taken, might shed some light as to whether some other persons had also handled the packets, for whatever such a discovery was worth. However, be that as it may, in my opinion, in the light of the facts of the present case, the mere failure to carry out a fingerprint test, by itself, could not justify the Court to draw any adverse inference against the prosecution or to draw any inference favourable to the accused. For, supposing such a test were in fact taken, and supposing further it showed that some other persons had also handled the packets, still, such a discovery, unless supported by some other cogent evidence in favour of the accused - and in the present case I found none - could not exonerate the accused. It is true that in all the five cases cited above the accused persons were acquitted, but in all those cases the failure to carry out a fingerprint test was not the only ground for the acquittal. There were other grounds too. Indeed, in each of those cases the failure to do so was relied upon merely as a subsidiary ground for the acquittal. Moreover, it is also important to note that, first, in all those cases cited, unlike the present case, the article in question was not found on the body of the accused and the accused denied being aware of the presence of the same; and, secondly, with reference to learned Counsel's suggestion, in none of the above cases did the Court invoke s. 114(9) of the Evidence Act by reason of the failure of the prosecution to take fingerprint impressions. And if I may add, adverse inference under s. 114(g) can only be drawn if there is withholding of evidence and not merely on account of failure to obtain evidence. In *Public Prosecutor v. Badrulsham* [1988] 2 MLJ 585 Lim Beng Choon J. said at p. 593:

> The next point raised by the learned defence Counsel was more serious. He contended that since the prosecution had failed to send the exhibits particularly the eight packets wrapped

in thin plastic sheets (P6A - H) to the chemist to check for finger prints, he urged this Court to invoke the presumption under s. 114(g) of the Evidence Act 1950 (Act 56) against the prosecution on the ground that had the prosecution carried out the finger print test it would probably show the existence of the finger prints of Noor Azlan and Bakree bin Jamil on the thin plastic coverings P6A - H thereby revealing that these two persons were involved in the drug trafficking transactions in question. The failure of the police to do so also resulted in a disadvantage to the accused in that "had the finger prints of the accused not been found on the exhibits" the accused would be entitled to an acquittal. The learned defence Counsel was not able to cite any authority in support of his contention. The answer to the learned defence Counsel's contention can, however, be found in the following passage of **Sarkar on Evidence** 12th Edn. at p. 1045 where it is stated:

> Adverse inference can be drawn if there is withholding of evidence and not merely on account of **failure to obtain evidence.** [Emphasis supplied]

Fifthly, it was submitted that the Court ought to invoke s. 114(g) of the Evidence Act by reason of the failure of the prosecution to call and offer to the defence the accused's father (Chuah Kim Sooi), the accused's girlfriend (Hueh Fei Ping) and accused's friend named Kenny. I refused to invoke the presumption. I saw no reason to do so. The principle governing the invoking of s. 114(g) was well stated in *Munusamy*. Mohamed Azmi SCJ delivering the judgment of the Supreme Court said:

> It is essential to appreciate the scope of s. 114(g) lest it be carried too far outside its limit. Adverse inference under the illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

In the present case, there was no deliberate attempt not to call these witnesses. On the contrary, an attempt had been made by L/Kpl Jaafar bin Ariffin (SP3) to serve the subpoena on accused's father; at the latter's house in Pusing, Perak., and two attempts had been made by Insp. Giam Kar Hoon (SP8) to serve the subpoena on accused's girlfriend. All were unsuccessful. They could not be located at the addresses known to the police. Although I accept learned Counsel's criticism of the police attempts to serve the subpoena on these two persons and that the police should have made more efforts to effect service, nevertheless, it cannot be denied that attempts were in fact made by the police; and therefore it cannot be said that the prosecution were withholding or suppressing evidence. Moreover, it was my view that neither the accused's father nor the accused's girlfriend was an important and material witness to the case. They were not at the scene where the accused was arrested. The accused, in his cautioned statement, did not in any way, either directly or indirectly, link them with the drugs found on his body. Accused's father played no role at all in the prosecution's case. Indeed, there was no mention at all about him in the prosecution's case (except that in re-examination, SP2 said that he recorded a statement from the accused's father). As for his girlfriend, Hueh Fei Ping, it is true that at the material time she was staying with the accused in a rented room. But the drugs were not found in the room rented by them. Hence, even if no attempt were made at all to call these two persons, still there is no justification at all in invoking s. 114(g) against the prosecution for not calling them.

As to the failure on the part of the prosecution to call this so-called Kenny, first and foremost, it must be pointed out that the prosecution never adduced any evidence as to the existence of a person by the name of Kenny. Kenny was only mentioned in the accused's cautioned statement (D55) which was adduced by the defence during the prosecution case. In his cautioned statement, accused alleged that it was Kenny who brought the packets containing the drugs to him and who asked him to carry the packets containing the drugs to Pulau Ketam; and it was Kenny who assisted him in tying the packages to his thighs. He did not know what the packages contained then. Only after he had been arrested that he came to know that the packets contained drugs. But when asked by the recording officer as to the identity of Kenny, the accused only gave a sketchy description, as follows:

> [Question:] Siapakah Kenny yang kamu sebut di atas?
>
> [Answer:] Saya tidak berapa kenal kepada Kenny. Dulu ada sekali-kali dia datang ke kedai runcit di mana saya kerja di Kepong Garden. Saya mula kenalnya sudah lebih

setengah tahun. Saya tidak tahu di mana dia tinggal tetapi biasa dia berkeliaran di Restorant Tai Tong di Desa Jaya Kepong. Dia berusia lebih kurang 28 tahun badan gempal kulit putih, tinggi lebih kurang 5 kaki 4 atau 5 inci berpakaian kemas biasanya T-shirt selat dalam pinggang. Percaya Kenny tinggal di Desa Kepong.

Although the information given by the accused was scanty, the investigating officer (SP2), nevertheless, did attempt to trace Kenny but because of the insufficiency of the information available he was not successful. In view of the vague information provided by the accused, it was unfair and unreasonable to expect much from the police in tracing this so-called Kenny - if at all such a person ever exist.

Sixthly, it was submitted by Encik Gurbachan that the prosecution could not rely on the presumptions under s. 37(d) of the Dangerous Drugs Act 1952 (Act 234) because the prosecution had failed to prove that the accused had custody and control of the packets containing the drug. He argued that in order to prove custody and control, the prosecution must prove that the accused had knowledge that the packets contained the dangerous drug. He contended that there was no evidence that the accused had such knowledge. *Pendakwa Raya v. Badrulsham* [1988] 2 MLJ 585 was cited.

I disagreed with such an interpretation. Section 37(d) reads:

37(d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

In my view, in a case such as the present one, all that is necessary for the prosecution to prove in order to trigger the two presumptions under the above provision against an accused person is to prove that the accused person was found to have had in custody or under his control "anything whatsoever" containing any dangerous drug. As long as the prosecution is able to prove that an accused was found to have had custody or control of this "anything whatsoever" and that this "anything whatsoever" did in fact contain a dangerous drug, then the two presumptions are triggered against the accused. This "anything whatsoever" could be anything. It could be a packet, a package or a bag, just to give a few simple examples. What is necessary to be proved is knowledge of possession of the "anything whatsoever" and not knowledge of the drugs that is contained therein. The intention of Parliament in creating the presumptions under that provision (to tighten the law and to provide for the more effective prosecution of drug traffickers) would be defeated if that provision were to be interpreted as requiring the prosecution to prove knowledge of the drug contained in the packet, or package, or bag, as the case may be, before the presumptions could be invoked. Of course, it is clear from the provision that the prosecution must prove that the accused has knowledge of the packet, or package, or bag, as the case may be. Such a knowledge is essential. For a person cannot be said to have had in custody or under his control of, say, a bag (i.e. the "anything whatsoever") if he has no knowledge of the existence of the bag. But if it is proved that he was found to have had custody of the bag or that the bag was under his control, and if it is also proved that at the time of custody or control the bag did contain a dangerous drug, then for the purpose of invoking the double presumptions under s. 37(d), the prosecution need not have to go further to prove that the accused has had knowledge of the existence of the dangerous drug in the bag. Once the two facts are proved, then the two presumptions under s. 37(d) are triggered: the first presumption is that the accused shall (until the contrary is proved) be deemed to have been in possession of such drug; and the second presumption is that the accused shall also, until the contrary is proved, be deemed to have known the nature of such drug. What the second presumption means is this. If the drug happens to be 15 grams of heroin then the accused shall (until the contrary is proved) be deemed to have had knowledge of the fact that the drug is 15 grams of heroin.

Therefore, in the present case, it was my view that, contrary to what learned Counsel had contended, there was no requirement for the prosecution to prove that the accused had knowledge of the existence of the drug in the three packets found on his body, in order to invoke the presumptions under s. 37(d). In order to invoke the presumptions, the prosecution only had to prove, first, that the accused was found to have had in custody or under his control the three plastic packets. Secondly, it must be proved that the three packets contained 864.27 grams of

heroin. If these two facts were proved, then the accused would be deemed (until the contrary was proved) -

(a) to have been in possession of the dangerous drug in the three packets; and
(b) to have known that the dangerous drug was 864.27 grams of heroin.

In the present case, on the evidence adduced, I was satisfied that the prosecution had proved beyond reasonable doubt that the accused was found to have had custody in or under his control the three plastic packets found on his body. There was no doubt about it: two packets were found tied to his thighs (one on each thigh), and another packet was found tucked in the underwear worn by him. Based on SP1's evidence, I was also satisfied that the prosecution had proved beyond reasonable doubt that the three plastic packets, at the time they were recovered from the accused's body, did contained 864.27 grams of heroin. The prosecution had therefore successfully invoked the presumptions under s. 37(d). This means that the accused -

(a) was deemed to have had been in possession of the dangerous drug; and
(b) was deemed to have known the nature of the dangerous drug, that is to say, 864.27 grams of heroin.

With respect to learned Counsel, *Badrulsham* does not support the proposition suggested by him. In that case, nothing at all was discussed in the judgment, as to what the prosecution must prove in order to invoke the presumptions under s. 37(d). In that case, at the end of the prosecution's case, learned Counsel elected not to submit on the issue of no case to answer. In other words learned Counsel had conceded that the presumption under s. 37(d) had been successfully invoked by the prosecution. And this was accepted by the learned Judge who said (at p. 588):

> As the prosecution has succeeded in invoking the presumption under s. 37(d) against the accused, it behoves the Court to give a correct interpretation of the word possession as used in the said section in order to be able to do justice to the instant case.

Finally, Encik Gurbachan submitted that even if the presumptions under s. 37(d) were successfully invoked by the prosecution, still there was no *prima facie* case against the accused because the defence had succeeded in rebutting the presumptions by the tendering, through the prosecution witness, accused's cautioned statement (D55). I have already referred to some of the contents of D55. But there were also some other things mentioned by the accused in D55. In his cautioned statement, the accused said that the packets were not his and that he did not know what the packets contained. He did not open the packets. He said in D55,

> **Saya rasa dalam plastik itu macam batu bata tetapi saya tidak buka tengok.**

However, he believed that it was illegal for him to carry the packets. He said in his cautioned statement,

> **Saya percayai ketul-ketul dalam 3 bungkusan plastik adalah salah kerana Kenny beritahu saya jangan bagi Custom suspect dan Kenny telah sorok barang itu dengan melekat di peha saya supaya menyembunyi daripada pengetahuan Custom.**

He said Kenny promised to pay him RM1000 for carrying the packets to Pulau Ketam. I did give due consideration to the cautioned statement. However, bearing in mind that I was still at the close of the case for the prosecution and was considering a submission of no case to answer, I also rejected this argument. Lest I be misunderstood, let me state here that in rejecting the argument I was, nonetheless, mindful of the principle that where a statutory presumption is raised against an accused person, so that the legal burden of proof is imposed on him, he may rebut this presumption either by adducing evidence during the case for the defence or by pointing to evidence in the case for the prosecution. However, I was also bound by the principle as laid down by the Supreme Court in *Public Prosecutor v. Adetunji Adeleye Sule* [1993] 3 CLJ 113 governing the weight to be attached to exculpatory cautioned statements adduced by the defence during the case for the prosecution. The Court said:

> In the same way, in a case where the onus lies on an accused to rebut a statutory presumption, a voluntary out of Court statement by the accused - and this would include a cautioned statement - which is wholly exculpatory should not be made the foundation of an order of acquittal especially at the close of the case for the prosecution, since at that stage, the accused not having given evidence himself, his explanation could not be tested by cross examination.

The Court further clarified:

> With respect, in our view, it is not correct to say that an unsworn self serving out of Court statement by an accused by itself is incapable, as a matter of law, of discharging an onus which lies upon him. The proper comment should be that such a statement should not be sufficient by itself to discharge the onus lying on the accused.

At the close of the case for the prosecution, both learned defence Counsel and Deputy Public Prosecutor made lengthy submissions pertaining to the principles governing the question of "*prima facie* case". I think the law has been made clear by the Supreme Court in *Munusamy*. At p. 497 of the judgment, it had been clearly explained by Mohamed Azmi SCJ as follows:

> It is obvious that there is nothing in *Haw Tua Tau* case to suggest that the "*prima facie* case" approach as understood in criminal trials in this country and enunciated in *Public Prosecutor v. Chin Yoke* is wrong in principle. On the contrary, in overruling the various passages in *Ong Kiang Kek* on the effect of s. 188(1) (formerly s. 177C) it reestablishes once and for all that there is no duty cast on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the accused at the close of case for the prosecution. There is accordingly no rejection of the "established beyond reasonable doubt" test, provided it is applied at that stage of the trial in the hypothetical form. Thus, under s. 180, the Judge must ask himself on the basis of credible evidence, a mere hypothetical question: "If I were to accept the prosecution's evidence as accurate, would it establish the case beyond a reasonable doubt?". Putting it in the "*prima facie* case" form, "On the assumption that the prosecution's evidence was accurate, could the accused be lawfully convicted?" If the answer to either question is in the affirmative, then a case is said to have been made out which, if unrebutted, would warrant a conviction, and in such a case the accused should be called to state his defence.

Now, having considered the evidence adduced by the prosecution, including the cautioned statement, and having considered the submissions of both the learned defence Counsel and Deputy Public Prosecutor, and bearing in mind the above passage in *Munusamy*, and taking into account the presumptions of law as provided by s. 37(d) and (da)(i) of the DDA, I was satisfied that the prosecution had made out a case against the accused which, if unrebutted, would warrant a conviction.

In stating his defence, the accused elected to give evidence on oath. He said that at the material time he was a shop assistant in a retail shop in Kepong Garden, Kuala Lumpur. He lived with his girlfriend, Hueh Fei Ping, in a rented room at a house in Taman Kepong, Kuala Lumpur. He said the drug was not his. He was asked to carry the drug to Pulau Ketam by a person by the name of Kenny. For the service rendered, Kenny promised to pay him RM1000. He did not know that the packets that he carried contained heroin: he was told by Kenny that they contained fish poison (racun ikan). It did occur to him to ask Kenny as to why not he (Kenny) himself carry the drug, but the latter explained that it was illegal to carry the fish poison and that the customs recognised him (Kenny) because he had previously been arrested once or twice.

As to his relationship with Kenny, accused testified that Kenny was his friend whose full name was Kor Chin Boon. Prior to the date of arrest he had known Kenny for about 8-9 months. Kenny was the brother of his employer. When he purchased a car on hire purchase, it was Kenny who became his guarantor.

On 14 November 1989, that is a day before the accused was arrested, at about 11 a.m., the accused was having a meal with his girlfriend, Cheah Li Yoong, at a restaurant known as Tai Tong Restaurant in Desa Jaya, Kepong, K. Lumpur. There he met Kenny who told the accused that he would be coming to his (the accused's) rented flat that night. That night, after the accused had returned to his rented room, his landlord told him that someone had come to see him. It was Kenny, who came at about between 12 midnight and 1 a.m. His girlfriend, Hueh Fei Ping, with whom he was staying with, was also present in the room. Kenny asked him to be at the Tai Tong restaurant the following day because he wanted the accused to do some work for him. The following day (15 November 1989), as arranged, he met Kenny at the Tai Tong restaurant at about 11 am. At the restaurant Kenny asked him to carry three plastic packets to Pulau Ketam. They then went into a toilet in the restaurant. In the toilet, Kenny asked him to remove his trousers. Kenny tied the packets to his thighs, one was tied to the left thigh, and the other to the right thigh. One packet was tucked inside his underwear. It was agreed at the restaurant that Kenny would

meet the accused at Pulau Ketam on the same day itself between 1 - 1.30 p.m. Accused then drove to Pelabuhan Kelang where on arrival he parked his car by the roadside in front of a police station. He boarded the ferry to Pulau Ketam. On arrival at Pulau Ketam, at the jetty, while crossing the bridge, he was arrested by the police. The accused said that whatever he had said in his cautioned statement, D55, was the truth.

The gist of the defence was that the accused had no knowledge of the actual contents of the packets. He was duped by his friend Kenny. Kenny had told him that he (the accused) was merely smuggling "racun ikan" on his (Kenny's) behalf to Pulau Ketam.

The defence called seven other witnesses, namely:

(1) his landlord at the material time, Tan Peng Yong (DW3);
(2) his girlfriend with whom he was living at the material time, Hueh Fei Ping (DW6);
(3) his girlfriend who paid for the car bought by the accused, Cheah Li Yoong (DW4);
(4) Encik Narander Singh a/l Chand Singh, Timbalan Penguasa, Penjara Pudu (DW2);
(5) Encik Shamsudin bin Mohd Said, Penolong Penguasa Penjara, Pusat Pemulihan Akhlak, Muar (DW7);
(6) Puan Kalwant Kaur, Pegawai Penjara Wanita, Pudu (DW8), and
(7) Dr. Ganesan (DW5).

At the end of the case for the defence, after considering submissions by both the learned defence Counsel and DPP, I was not satisfied that the defence had succeeded in rebutting the presumptions under s. 37 (d) and (da)(i) of the DDA on a balance of probability, nor has the defence succeeded in raising a reasonable doubt. In other words, at the end of the defence case, I was satisfied that the prosecution had proved the charge against the accused beyond reasonable doubt. My reasons are as follows.

First, I note that although the accused placed much reliance on his cautioned statement (D55), yet his evidence in Court contradicted what he had said in D55. In D55, he said,

> **Saya tidak berapa kenal kepada Kenny. Dulu ada sekali-kali dia datang ke kedai runcit di mana saya kerja di Kepong Garden.**

In Court, however, accused said in cross examination,

> **Saya benar-benar kenal Kenny.**

Further during cross-examination the accused again said,

> **Saya kenal rapat dengan Kenny sebab dia selalu datang ke kedai runcit abang saya.**

There were other glaring contradictions as well. In D55, accused said that he did not know what the packets contained. However, in Court the accused said Kenny told him that the packets contained "racun ikan".

Then I also noted that in his evidence, the accused described his occupation as follows:

> Saya menjadi seorang pembantu kedai runcit sejak lebih kurang Disember 1985. Nama kedai itu ialah Huat Trading, di Kepong Garden, Kuala Lumpur.

But in D55, he described his occupation differently:

> Saya telah datang ke Kuala Lumpur untuk cari makan sudah empat tahun. Saya mula berkerja di sebuah kedai di Kepong Garden nama Huat Trading, iaitu sebagai pembantu kedai. Kedai itu telah tutup sudah setahun lebih dan kini saya berkerja sebagai pemandu lorry dengan setornya iaitu Huat Trading di Sg. Buluh.

There was also another unsatisfactory aspect of his testimony. In Court the accused said that he knew Kenny's real name, that is, "Kor Chin Boon". He went on to say that Kenny was his guarantor in a hire purchase transaction for the purchase of a car, WBL 9514 and that the name "Kor Chin Boon" appearing in the "Notice of Intention to Repossess" (D50) was that of Kenny. Now, D55 was voluntarily made by the accused. It was not made hastily immediately after arrest but the following day, 16 November 1989. The caution was duly administered to him. All this was not in dispute. In fact, as has been said above, it was the defence who insisted in adducing D55 through the prosecution witness. Yet it was remarkable that accused did not mention "Kor Chin Boon" in his cautioned statement if it was really true that he was duped by this person "Kor Chin Boon" and it was also remarkable that he only gave a very vague description of the identity of Kenny in D55.

Furthermore, I could not believe that the accused could be so naive as to really believe that he was merely smuggling "racun ikan" and that he was merely committing a minor offence, if it is true that he was paid RM1000, which was twice the amount of his monthly salary, to do so.

His landlord (DW3) was called to corroborate accused's evidence that Kenny did come to accused's house on the night of 14 November 1989, between 12 midnight and 1 am. However, there was nothing in his evidence that corroborated what the accused had told the Court. This was what the witness told the Court:

> Pada malam 14 November 1989 saya berada di rumah itu. Pada malam itu antara 12 malam hingga satu pagi, saya sedang menonton TV, selepas itu saya pergi tidur. Semasa menonton TV **tidak ada apa yang berlaku.** Semasa menonton TV tertuduh tidak ada di rumah. **Tidak ada orang datang ke rumah saya.** Saya tidak tahu tarikh bila tertuduh ditangkap. Saya ada nampak Polis datang ke rumah saya pada suatu hari. Polis bawa tertuduh bersama mereka. Sehari sebelum ini, **tidak berlaku apa apa.** Sehari sebelum hari tertuduh ditangkap, disebelah malam, saya **tidak ingat apa apa yang berlaku.**
> [Emphasis mine]

It will be noted that after having said, **"...tidak ada apa yang berlaku"** and again, **"...tidak berlaku apa-apa perkara"**, yet when asked further, DW3 modified his evidence to that of **"tidak ingat berlaku apa-apa"**.

However, when asked further by learned defence Counsel, DW3 seemed to know something, and he then said:

> Ada suatu hari di mana orang datang ke rumah saya untuk mencari tertuduh. Nama orang itu saya tak ingat. Nama panggilannya ialah "Kenny".

I, therefore, could not accept DW3 as a credible witness.

His girlfriend, Cheah Li Yoong (DW4) testified on behalf of the defence but merely to corroborate the accused's evidence that she did go out for a meal with the accused at the Tai Tong Restaurant on the night of 14 November 1989; that the accused met Kenny and was seen talking together at the restaurant; and that she paid the downpayment and instalments for the car WBL 9514. DW4 said that in 1989 she was doing two jobs. During the day she worked in a saloon, and during the night she worked in a nightclub. She said her monthly income in 1989 was RM3000 to RM4000. She said she gave the accused RM8000 for the downpayment of the car and thereafter RM1000 (or sometimes less) for the instalments. I also found this witness to be an unreliable witness, who was symphatetic to the accused. One of the reasons is this. When asked by the learned DPP as to whether she knew what happened to the car WBL 9514, she said she did not know what had happened to the car. When further asked by the learned DPP:

> S: Tidakkah kamu ingin tahu apakah terjadi kepada kereta itu, walhal kamu telah membayar wang muka sebanyak RM8000 dan juga bayaran ansuran?

this witness, rather strangely (or perhaps evasively), replied as follows:

> Wang telah dipakai. Nak tahu apa terjadi kepada kereta itu tidak berguna.

She said that prior to 1989 she had known the accused for five to six years and was very close to the accused (**"Perhubungan saya dengan tertuduh adalah rapat, cukup rapat"**). Yet on the other hand she also said that she had never been to the accused's house or flat, nor did she know where the accused lived.

Moreover, she said she was aware that the accused was living with another of his girlfriend (DW6) in his rented room. Yet, surprisingly, she said she was not jealous. Could I, in all honesty, believe that a woman in the position of this witness would not be jealous and would be willing to part with so much of her hardearned money to pay for her boyfriend's car when knowing that the boyfriend was living with another woman? I simply could not.

His other girlfriend, Hueh Fei Ping (DW6) was another symphetatic and unreliable witness. She testified to corroborate accused's evidence that Kenny came to their rented room on the night of 14 November 1989, and also to give evidence to rebut the suggestion by the prosecution (made during the cross-examination of the accused) that the tapes (P13 and P15) used to strap the packets to the accused's thighs were from the two rolls of "Appollo" tapes (P27) found in their room when the police raided their room at 8.10 p.m. on the night of the day of the arrest (15 November 1989). She said she bought those two rolls of tape from the shop where she worked to keep away smokes from entering their room since their room was near the kitchen. In my

view, whether or not P13 and P15 originated from P27 was not an important point. However, there was an unsatisfactory aspect of her testimony. It was that, according to her, prior to accused's arrest, she had been staying together with the accused for one year, and that the accused had been giving her money monthly. She claimed that she loved the accused. Yet surprisingly, she did not even know where the accused worked and how much he earned. She was not even aware that the accused had a car then. However, and surprisingly, when it came to giving evidence concerning the accused and Kenny, particularly concerning the night of 14 November, she seemed to be less ignorant and quite informative.

I had considered and I did not find the evidence of the prison officers DW2, DW7, DW8 were of any relevance.

Considering the defence evidence as a whole, since the defence of the accused was that he thought the packets merely contained "racun ikan", in other words the defence was denial of knowledge of the contents of the packets, there was really nothing much in the testimony of the accused and, more so, the defence witnesses that could in any way convince me that, on a balance of probability, the accused did not know that the packets contained heroin. Accordingly, it was my considered view that the defence had failed to rebut on a balance of probability the presumptions under ss. 37(d) and (da)(i).

Finally, I now come to the evidence of the Dr. Ganesan, DW5, whom the defence contended was an expert on drugs analysis. His qualifications appeared to be impressive, as set out in D57. He gave his occupations as Forensic Science Consultant and as Visiting Lecturer in Forensic Science, I.T.M. Shah Alam, Selangor. His qualifications were:

(a) Bachelor of Science (Delhi University, India, 1967);
(b) Post-Graduate Certificate Forensic Science (Delhi University, India, 1972);
(c) Master of Science in Forensic Science (Punjabi University, India, 1984);
(d) Doctor of Philosophy (Punjabi University, India, 1984).

He received his training in narcotic drug analysis from the following laboratories:

(a) Central Forensic Laboratory, Central bureau of Investigation, New Delhi, India;
(b) Central Forensic Science Laboratory, Chandigarh, India;
(c) State Forensic Science Laboratory, Jammu and Kashmir, India

DW5 gave evidence that he had given evidence in the Courts of this country as a forensic chemist and his evidence had been accepted by the Courts.

However, in cross-examination, this was what the witness said:

> I have not done any test to challenge the finding of a government chemist. I have never worked in the government service before. I have received my training in various laboratories during my masters education. After obtaining my Master's degree, I did my Ph.D. degree but I have not worked in any of the laboratories after obtaining my Masters degree. I have not worked in any of the laboratories in this country.
>
> Q: Do you agree with me that your so-called expert opinion given in Court today is based merely on the theoretical aspect of the analysis?
>
> A: Yes, my Lord.
>
> The last time I did an analysis on drugs was in 1977 when I did my masters degree course.

Further in cross-examination (on 14 October 1993) the witness said:

> I have never worked with the United Nations before. I have never testified in Courts outside this country before. My qualifications are not recognised by the Government of this country.

Learned DPP contended that DW5 was not an expert. It was argued that notwithstanding his impressive qualifications, his qualifications were not recognized by the Government of this country and he had no practical experience working in laboratories after obtaining his Masters in 1977. 1 accepted learned DPP's contention, but not because Dr. Ganesan's qualifications were not recognized by the Government, but because of his lacking in practical working experience since obtaining his Master's degree. The last time he did an analysis on drugs was in 1977 when he was working for his Master's degree. Dr. Ganesan might be an expert in 1977. But he could not claim to continue to be an expert in 1993 - 13 years later - if during the interim period he ceased to have any practical experience.

Assuming that I am wrong in not accepting Dr. Ganesan as an expert, still, judging from his testimony, there was nothing in his evidence that really contradicted the tests employed by SP1. This was what DW5 himself said in examination in chief:

> There are a number of tests to be conducted in order to determine whether a particular substance is heroin or not. First, there is the preliminary or colour test. Second test is the thin layer chromatography test - also referred to as the TLC test. The third is the gas chromatography test. The fourth test is the gas chromatography and mass spectrometry test. In short it is also known as GCMS. This is the latest technic that has been followed throughout the world.
>
> Q: If these four tests are not done, then is it correct to say that it cannot be determined that a given substance is heroin?
>
> A: My Lord, if only three tests are done, then it is sufficient to determine that a given substance is heroin. In certain circumstances, even if two tests, that is the preliminary test and the GCMS, are sufficient to determine whether the controlled substance is heroin.
>
> Q: What are the three tests you mentioned earlier as being sufficient?
>
> A: The preliminary test or colour test, the TLC test and the GC test.
>
> Q: Would you agree that if all the four tests are done, then the determination of the substance as being heroin is fullproof?
>
> A: Yes, my Lord, I would like to add. But even the three tests is a fullproof method.
>
> I agree that if the two tests mentioned earlier, or the three tests mentioned earlier, are not done, then it is impossible to determine whether a given substance is heroin or not.
>
> I agree that the preliminary test or colour test is merely a presumptive test.
>
> Q: In your opinion is it better to conduct the three tests rather than the two tests?
>
> A: I do not agree because both the two tests method and the three tests method are equally or highly sensitive.

It will be seen from the above that nothing was said by this witness contradicted the evidence of SP1. On the contrary, his evidence confirmed that the tests carried out by SP1 were the correct tests. In view of this, the defence in calling DW5 had failed to raise a reasonable doubt on the prosecution's case that the substance found on the accused had been correctly analysed and found to contain 864.27 grams of heroin.

Accordingly I found the accused guilty of the offence charged; and he was convicted and sentenced according to law.